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No. 1032

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

GEORGE A. LEE, *Petitioner*,

vs.

WESTERN WOOL PROCESSORS, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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WESTERN WOOL PROCESSORS, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this cause.

Opinions Below

The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix I.

Jurisdiction

The judgment of the Court of Appeals was entered December 31, 1962. The time for filing this petition was extended to and including April 22, 1963, by Order dated March 25, 1963.

Jurisdiction to issue the writ rests on Title 28, United States Code, § 1254.

Questions Presented

1. In affirming the judgment of a judge of the District Court overruling and reversing a prior Order of a Judge of the same court, has the Court of Appeals so far sanctioned a departure from the usual course of judicial administration as to require correction by this Court?

2. When one judge of the District Court reviewed and construed his own prior Order and ordered the payment of the amount of petitioner's judgment out of the Registry of the Court in conformity with such prior Order, is it error and an abuse of discretion for a judge of the same Court to overrule and reverse the action of his colleague judge when the facts and circumstances under which both judges were acting were identical and the first judge was available to reconsider his Order?

3. Did the Court of Appeals commit error in affirming the judgment of the District Court requiring the payment of the amount of Petitioner's judgment into the Registry of the Court?

Statutes Involved

There are no statutes involved in this petition.

Statement of the Case

Petitioner, appellant and plaintiff below, herein referred to as plaintiff, recovered judgment on a promissory note against the respondent, appellee and defendant below, herein referred to as defendant. In order to stay execution defendant deposited an amount equal to plaintiff's judgment into the court as security for the payment of the judgment pending trial of counterclaims. In conformity with the provisions of his own self-executing order one judge of the District Court ordered the payment of plaintiff's judgment from the registry of the court. Subsequently, and without an intervening change of facts or circumstances, another judge of the same court entered judgment against plaintiff for the repayment into court of a like amount as previously paid him by the court.

Plaintiff is petitioning for a Writ of Certiorari to review the order of the Circuit Court affirming the last judgment of the second District Judge.

On stipulation and motion for partial summary judgment the District Court entered judgment for plaintiff based on defendant's promissory note and stayed execution pending disposition of the counterclaims pleaded in the Answer of the defendant (R.29). Defendant persisted in asserting further and additional counterclaims which were not contained in his Answer (R. 69). After it became apparent that defendant was adopting tactics calculated to hinder and delay plaintiff in obtaining the amount concededly due him by buying up or otherwise acquiring claims to be asserted as counterclaims in the case (R. 69, 70) plaintiff applied for and obtained a vacation of the stay of execution (R. 3). Defendant refused to pay the judgment and it was necessary to levy execution on defendant's manufacturing plant (R. 64, 66, 67).

Plaintiff desisted from his execution proceedings in consideration of defendant's depositing the amount of the judgment with the court and the stipulation for entry of order of November 22, 1961 (R. 66, 67). The order provided that on failure of defendant to reimburse plaintiff or his attorneys for costs and expenses incurred in his execution proceedings within ten days of the receipt of a statement therefor, plaintiff was entitled to payment of the amount of his judgment and accrued interest. (R. 5, 6).

Such a statement was received on December 22, 1961 (R. 9). No payment of this statement was made, attempted or received within the ten days following. On January 3, 1962, the twelfth day after receipt of the statement, and in accordance with the provisions of the District Court Order, plaintiff made application to the Clerk for the payment of his judgment (R. 7, 8). The Clerk suggested by telephone to Judge William E. Doyle that a formal order should be prepared. Judge Doyle had very recently been assigned to the case and accepted the Clerk's suggestion. Plaintiff's attor-

ney then returned to his office to prepare the order. While the order was being prepared there was delivered in the mail (January 3, 1962) a personal check of defendant's attorney for the amount of the statement received the previous December 22nd. Upon return to the court plaintiff's attorney discovered that Judge Doyle had completed his business for the day and had departed. At the Clerk's suggestion plaintiff's attorney took the file, and defendant's check and the envelope it came in, together with the application and the order previously prepared, to Judge Chilson, the Judge who had previously been assigned the case. Judge Chilson examined his own order of November 22, 1961, the check and the envelope, and the order prepared by plaintiff's attorney; with all the facts before him, Judge Chilson construed his own order and decided that the plain terms of his order did not require the entry of an additional formal order for the payment of plaintiff's judgment. Judge Chilson then signed the check ordering the payment of plaintiff's judgment from the registry (R. 8).

Some two months later, defendant presented to Judge William E. Doyle a "Motion for Order Requiring Redeposit of Monies Withdrawn From the Office of the Clerk of the Court" (R. 9). After a hearing in which no additional or different facts were presented, Judge Doyle apparently taking a view of the matter different from Judge Chilson's, entered the Order which amounts to a judgment against plaintiff for the amount of his judgment (R. 19, 20). The nature of this Order as a final judgment is confirmed and established by subsequent measures requiring supersedeas bond as a condition of stay of execution and other measures to enforce payment of the money as required by the Order or Judgment.

There has been no trial or other disposition of any of defendant's counterclaims.

Basis for Federal Jurisdiction

Federal jurisdiction in the court of first instance is based upon the provisions of Title 28, United States Code, Annotated § 1332.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has sanctioned a departure from the usual course of judicial administration of such a nature as to require correction by this Court.

It has long been an established principal of judicial administration that when one district judge is available to hear a matter which he had previously considered and determined, and the facts and circumstances upon which the prior determination were made are the same, it is error and an abuse of discretion for a different judge of the same court to consider the matter, much less enter an order either consistent with or contrary to the prior order of his colleague. *Eg., United States vs. Wheeler*, 256 F. 2d 745 (3rd Cir. 1958), *certiorari denied*, 79 S. Ct. 111, 358 U. S. 873, 3 L. Ed. 2d 103, *rehearing denied*, 79 S. Ct. 229, 358 U. S. 873, 3 L. Ed. 2d 234, *certiorari denied*, 363 U.S. 828, 80 S. Ct. 1597, 4 L. Ed. 2d 1523 (1960); *TCF Film Corporation vs. Gourley*, 240 F. 2d 711 (3rd Cir. 1957); *Donnelly Garment Co. v. National Labor Relations Board*, 123 F. 2d 215 (8th Cir. 1942), *reversed on other grounds*, 67 S. Ct. 756, 330 U. S. 219, 91 L. Ed. 854; *Humphrey vs. Bankers Mortgage Company of Topeka, Kansas*, 79 F. 2d 345 (10th Cir. 1935); *Reynolds v. Iron Silver Min. Co.*, 33 F. 354 (Cir. Ct., D. Colo. 1888); *Williams v. Tidewater Associated Oil Company*, 125 F. Supp. 675, *reversed on other grounds*, 227 F. 2d 791, *certiorari denied* 76 S. Ct. 348, 350 U. S. 960, 100 L. Ed. 834 (1956). In affirming the judgment of the District Court, the Court of Appeals has sanctioned such a practice and has disregarded and refused to follow its previous holding in *Humphrey vs. Bankers Mortgage Company of Topeka, supra*. The opinion of Donnelly Garment Co. v. *National Labor Relations Board, supra*, contains the following language:

> "It is a long established rule that judges of the same court will not knowingly review, reverse or overrule each other's decisions. . . . The necessity of such a rule in the interest of an orderly administration of justice is clear."

United States vs. Wheeler, supra, admonished that judges of the same court should not place themselves in a position whereby in rendering "impartial judgment on a question they might be required to overrule the decision of a judge of the same court in the same case." The opinion states:

> "The crux of the matter, then, is not whether a second judge on reconsideration of a question can or should overrule the first judge but whether he may properly entertain the reconsideration at all. . . .
>
> . . . . the heart of the matter is whether a second judge may properly entertain the reconsideration at all. We have indicated that if the first judge is available the matter should again be presented to him. . . .
>
> . . . . the same testimony was nothing more that a review of Judge Miller's earlier decision and was an abuse of discretion. Such a review would under the circumstances have been an abuse even had the result been the same as Judge Miller's though the error would, of course, then have been harmless. And it would still under the circumstances have been an abuse of discretion even had the results reached by each judge on the merits been the opposite."

In support of the same proposition the Third Circuit opinion of *TCF Film Corporation vs. Gourley, supra*, states:

> "The petitioners base their claim . . . upon the rule that judges of coordinate jurisdiction setting in the same court and in the same case should not overrule the decisions of each other, a rule which this court followed in Jurgenson v. National Oil and Supply Company, 3rd Cir., 1933, 63 F. 2d 727, 729, and Price v. Greenway, 3rd Cir., 1948, 167 F. 2d 196, 199-200, and which has been applied in many other cases in this circuit as well as elsewhere. The respondents on the other hand contend that the rule, which is perhaps best exemplified by the opinion of the Court of Appeals for the Second Circuit in the case of Commercial Union of America v. Anglo-South American Bank, 1925, 10 F.

2d 937, has been deprived of its authoritative basis, by the recent decision of that court in Dictograph Products Company v. Sonotone Corporation, 1956, 230 F. 2d 131.

"It is true that the Dictograph case indicates that the rule under discussion is not absolute and all encompassing in its scope. There are, as the case illustrates, exceptional circumstances under which the courts have held that one judge of a district court may overrule a decision of this court in the same case. Nonetheless we think that the rule is a most salutary one. We adhere to it and hold that except under the most extraordinary circumstances it should be followed by the district judges of this circuit. The reasons for the rule have been reiterated in the many cases in which it has been applied and need not be repeated here in detail. It is sufficient to say that we regard it as a necessary rule of judicial comity, to preserve the orderly functioning of the judicial process.

"As we have said, there may be exceptional circumstances under which the rule is not to be applied. Such circumstances exist when the judge who made the original decision is not available to consider the application to rehear and reverse his decision. If the judge who made the decision dies or resigns from the court he obviously is no longer available to reconsider it and such reconsideration must perforce be by another judge if it is to be had at all. Likewise if the decision has been made by a judge temporarily assigned to the court for the hearing of a specified case and his assignment is terminated he is no longer available to entertain an application for rehearing and it must accordingly be considered by another judge."

Hardy vs. North Butte Mining Co., 22 F. 2d 62 (9th Cir. 1927) contains the following:

"The sole question presented for decision is this: If an order appointing receivers is made in a suit within the jurisdiction of the court making the order

> and in the exercise of judicial discretion, may another judge sitting in the same court, on the same record of his own motion or otherwise, vacate the order of appointment because, in his opinion, the order was mistakenly or improvidently made. On both principle and authority this question must be answered in the negative."

By January 3, 1962, the twelfth day after receipt by defendant's attorneys of the statement of plaintiff's costs, it was clear that defendant was in default of the condition expressed in the Order of November 22, 1961 and that plaintiff was entitled to the payment of his judgment. Assuming, arguendo, that the situation was not clear. Defendant's check together with the post marked envelope in which it was enclosed and the affidavits showing the date of receipt of the statement were presented to Judge Chilson on January 3, 1962. Judge Chilson read his own order, examined the check and envelope together with the affidavits attached to plaintiff's application and on these facts decided that the formal order for payment prepared by plaintiff's attorney was not necessary as his Order of November 22, 1961 was clear in that regard, and that all that was required to order payment was to sign the check prepared by the Clerk. Judge Chilson, with full knowledge of the undisputed facts, construed his own order and resolved any ambiguity that may have existed. This judicial act finally settled the matter and defendant's only proper course to obtain a modification or reversal of the Court's order was by way of appeal—not by shopping about for another judge to again present the matter. The Court of Appeals condoned this practice in affirming the judgment of the second judge to whom the matter was presented for reconsideration and in so doing has so far sanctioned the departure from the usual course of judicial administration as to require correction by this Court.

The Court of Appeals has rendered a decision in conflict with the decisions of other courts of appeals on the same matter.

The order for the payment of plaintiff's judgment from the registry of the Court was entered in the manner prescribed by the Order of November 22, 1961, i.e., by the signing of the check by the Clerk and the first judge. The Order of November 22, 1961 provides in part as follows:

> "7. Should the defendant fail to make any of the payments required by paragraph 4. . . . then on application of plaintiff and without necessity of notice to defendant or further order of court, the Clerk of the Court shall pay plaintiff or plaintiff's attorney of record so much of the security deposits . . . . as may be necessary to satisfy plaintiff's judgment in full. . . ."

The first judge had the same facts before him as were presented to the second judge and no others. As previously stated, the first judge specifically ruled that no formal order was necessary for the payment of plaintiff's judgment. The signing of the check was an order entered by the first judge after being fully apprised of the facts, and operated as an adjudication that plaintiff was in fact entitled to the payment of his judgment. This adjudication was reversed by the second judge and such procedure was approved by the Court of Appeals. The Third Circuit in *United States vs. Wheeler, supra*, and *TCF Film Corporation vs. Gourley, supra*, holds that such judicial action is error and an abuse of discretion as does the Eighth Circuit, *Donnelly Garment v. National Labor Relations Board, supra*. The Second Circuit, *Dictograph Products Company v. Sonotone Corporation*, 230 F. 2d 131 (2nd Cir. 1955) and the Ninth Circuit, *Castner v. First National Bank of Anchorage*, 278 F. 2d 376 (9th Cir. 1960); *Beedy v. Washington Water Power Co.*, 238 F. 2d 123 (9th Cir. 1956) are in conflict with the Third and Eighth Circuits. The Tenth Circuit, prior to its opinion in this case, had aligned itself with the Third and Eighth Circuits, *Humphrey vs. Bankers Mortgage Company of Topeka, Kansas, supra; Reynolds v. Iron Silver Min. Co.*, 33 F. 354, (Cir. Ct., D. Colo. 1888). It is necessary for this Court to settle those conflicts and

the orderly functioning of judicial administration dictates that this Court should resolve the conflicts by establishing the rule here advocated.

The Court of Appeals erred in affirming the judgment of the District Court requiring the payment of the amount of Plaintiff's judgment into the Registry of the Court.

The Order of November 22, 1961 is clear in its requirement that plaintiff's attorney must be in receipt of the reimbursement for costs expended in the execution proceedings, within ten days after receipt by defendant of a statement therefore; and in case of default, plaintiff was entitled to withdraw the amount of his judgment without further notice to defendant or further court order. The Order provides:

> "4. Within 10 days after receipt of statement from plaintiff's attorney, defendant shall reimburse plaintiff's attorney for all payments of court costs since date of judgment including clerk's fees, marshal's fees, sheriff's fees, recording fees and advertising, as shown by the statement."

and paragraph 7 of the order states:

> "Should defendant fail to make any of the payments required by paragraph 4 . . . . then on application of plaintiff and without necessity of notice to defendant or further order of court, the Clerk of the Court shall pay plaintiff or plaintiff's attorney of record so much of the security deposits mentioned in paragraph 6 as may be necessary to satisfy plaintiff's judgment in full. . ."

Receipt is what is emphasized in the order. Defendant's time to reimburse plaintiff did not start to run on the mailing of the statement, but only on receipt of the statement. Defendant was merely required to see to it that plaintiff's attorney received reimbursement within ten days.

The facts are undisputed. Defendant received the statement on December 22, 1961. The ten days within which to place plaintiff's attorneys in receipt of the money constituting reimbursement expired January 1, 1962. Assuming defendant had an extra day because of the January 1 holiday, receipt of the money was still required to be had not later than the eleventh day which was January 2. No such reimbursement having been received, plaintiff was clearly entitled to make application to the court and Judge Chilson was clearly right in ordering payment of plaintiff's judgment under the order of November 22, 1961.

The concern here is with the plain meaning of a clear Order of the District Court. Resort to fiction and analogies to the law of payment are not applicable nor warranted. The Court of Appeals erred when it approved of the findings of the second judge of the District Court as found in its opinion as follows:

> "In interpreting its own order the trial court (second judge) held that the payment was timely; that the usual course of dealings between the parties established the use of the mails for payment, and drew such inference from the facts that the lawyers were in different cities, the statement of costs had been mailed, and all other service and negotiations by the parties in connection with this lawsuit had been submitted by mail. Under the circumstances, we find no error of law and the finding of the trial court cannot be set aside as clearly erroneous . . ."

Assuming, arguendo, that the law of payment was applicable, there had been no prior dealings between the attorneys relating to the payment of debts or money. The cases dealing with the problem of payment by use of the mails all involve a debtor-creditor relationship, a situation that does not exist in this case, and hold that to constitute payment at the time of deposit in the mails, there must have been a series of payments using a check and the mails for delivery and acceptance of such method by the person entitled to receive the remittance. *Faut vs. Miller*, 218 S. W.

2d 901 (Tex. Civ. App. 1949); *Mackey vs. Dobrucki*, 116 Conn. 666, 166 Atl. 393 (1951); *Brandtjen & Kluge vs. Pope*, 28 Tenn. App. 679, 192 S. W. 2d 496 (1945). In *Faut vs. Miller, supra*, the following is found:

> "Ordinarily a check mailed on the last day for payment, not received on that day, is not a timely payment, unless there is established a custom of the debtor to pay in that way, or the creditor has led him to believe that the check will be received as cash."

In *Bloomer vs. Kirkman Corp.*, 38 Cal. 2d 480, 241 P2d 17 (1952), the creditor stated in a letter to the debtor that he can "send in the payment" and it was held that such a communication using itself the mails did not constitute an agreement or a course of conduct or consent that the remittance contemplated be made by mail, quoting 70 C. J. S., Payment, Section 7, page 218. The rule is reiterated in *Guardian Nat. Bank vs. Huntington County State Bank*, 206 Ind. 185, 187 N. E. 388 (1933).

Under the plain meaning of the Order of November 22, 1961, defendant was required, within ten days after receipt of the statement, to place plaintiff's attorney in receipt of the amount indicated in the statement. Defendant was at liberty to adopt any means of transmission he desired so long as reimbursement was received within the time prescribed, and this it failed to do. The interpretation of the second judge of the District Court of the Order of November 22, 1961 was clearly erroneous and the Court of Appeals was in error in affirming it.

CONCLUSIONS

The ruling of the Court of Appeals sanctions an intolerable departure from the usual course of judicial administration which requires correction by this Court. The Court of Appeals has rendered a decision in conflict with its own prior rulings and those of other circuits relating to same

important question of judicial administration which should be resolved by this Court. The Circuit Court committed error in affirming the erroneous judgment of the District Court interpreting an order that was devoid of ambiguity.

Respectfully submitted,

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APPENDIX I

United States Court of Appeals

TENTH CIRCUIT

No. 7004 — November Term, 1962

GEORGE A. LEE,
Appellant,

v.

WESTERN WOOL PROCESSORS, INC.,
Appellee.

Appeal from the United States District Court for the District of Colorado

(December 31, 1962)

William J. Hewitt (Dayton Denious was with him on the brief) for Appellant.

Robert B. Murray of Murray and Hecox for Appellee.

Before MURRAH, Chief Judge, and LEWIS and SETH, Circuit Judges.

LEWIS, Circuit Judge.

This action arose in the District Court for the District of Colorado as a claim by plaintiff-appellant upon a promissory note. Defendant-appellee did not question the alleged indebtedness on the note but pleaded the existence of counterclaims. Upon stipulation and motion for partial summary judgment, the court entered judgment for plaintiff in the amount of $17,262.50, staying execution pending determination of the counterclaims. As conditions of the

stay order defendant was required to deposit with the clerk of the court the sum of $18,271.69 and to make further deposits of interest payments from time to time. The order, dated November 22, 1961, also provided:

> "4. Within 10 days after receipt of statement from plaintiff's attorney, defendant shall reimburse plaintiff's attorney for all payments of court costs since date of judgment including clerk's fees, marshal's fees, sheriff's fees, recording fees and advertising, as shown by the statement."
>
> "7. Should defendant fail to make any of the payments required by paragraph 4. . . ., then on application of plaintiff and without necessity of notice to defendant or further order of court, the Clerk of the Court shall pay plaintiff or plaintiff's attorney of record so much of the security deposits . . . as may be necessary to satisfy plaintiff's judgment in full, and shall pay to defendant or defendant's attorney of record any remaining balance of such security."

On January 3, 1962, plaintiff's attorney, in an ex parte application and upon representation that defendant had not met the conditions of paragraph 4, obtained the full amount of the money on deposit with the clerk. The check representing the amount of the deposit was signed by the clerk and the judge who had entered tthe order conditionally staying execution.

Several weeks later defendant learned that the deposit of monies had been paid to plaintiff and immediately sought an order requiring the return of the monies to the registry upon claim that there had been no violation of the provisions of paragraph 4 of the stay order. The motion was heard by a judge other than the judge who had entered the stay order but to whom the case had been then regularly assigned. Defendant's motion was granted and an order entered requiring plaintiff to forthwith re-deposit with the clerk all monies withdrawn. This appeal is taken from such order and our initial consideration must be directed to the question, raised by motion to dismiss, of whether this court

is without jurisdiction to review the order in that it is not a final decision, 28 U.S.C.A. 1291, nor within the purview of interlocutory determinations permitted under 28 U.S.C.A. 1292.

Clearly the order appealed from has interlocutory aspects in its nature but plaintiff-appellant relies upon the liberal interpretation of the final judgment rule rendered by the United States Supreme Court in numerous cases, *Forgay v. Conrad* (1848) 6 How. 201, 12 L. Ed. 404; *Thomson v. Dean* (1868) 7 Wall. 342, 19 L. Ed. 94; *Radio Station WOW v. Johnson* (1945) 326 U. S. 120, 124, 65 S. Ct. 1475, 89 L. Ed. 2092; *Swift & Co. Packers v. Compania Colombiana Del Caribe* (1950) 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206. Defendant-appellee counters with language from those cases and others which appears to exclude from their operation orders for the payment of money into court or trust to abide the final decision on the merits of the case and cites particularly *Louisiana Bank v. Whitney* (1887) 121 U. S. 284, 7 S. Ct. 897, 30 L. Ed. 961, wherein it is stated:

> ". . . The court has not adjudicated the rights of the parties concerned. It has only ordered the funds into the registry of the court for preservation during the pendency of the litigation as to its ownership. Such an order it has always been held is interlocutory only and not a final decree. . . . ." 121 U. S. at 285.

But the view that the present order falls in the general description of funds impounded by the court pending litigation is an oversimplification of the fact situation. Here, the parties entered an agreement to withhold execution of a judgment already obtained subject to certain conditions. The plaintiff-appellant, regarding the agreement as breached by by reason of the failure of the conditions, withdrew the funds in accordance with the remedy afforded by the stipulation. Defendant-appellee, contending that no breach had occurred, sought the ruling of the court. The order entered finalized the matter as to the interpretation of the agreement. It has no bearing upon the merits of appellant's judgment nor the validity of counterclaims. If

review is postponed until the entire case is ripe for appeal, the right claimed and resolved by the trial court will be a nullity. Thus, the order here involved falls within the rule of *Cohen v. Beneficial Industrial Loan Corp.* (1949) 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528:

"... But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to effect, or to be affected by, decision of the merits of this case.

"This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, right asserted in this action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. . . .

> "We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, . . . appealability would present a different question." 337 U. S. at 547.

We hold that under the totality of circumstances the subject order is appealable and the motion to dismiss is so denied.

We find, however, that plaintiff's dual appellate contentions that the trial court erred and was without jurisdiction to require re-deposit of the monies are without merit. The undisputed facts show that attorneys for de-

fendant received through the mail at their Colorado Springs office on December 22, 1961, the statement of costs mailed by plaintiff's attorneys from their Denver office. On January 2, 1962, defendant's attorneys mailed back their check for the full amount which was received by plaintiff's attorney's on January 3, 1962. Plaintiff's attorneys had at such time applied for but had not received the deposited monies. In interpreting its own order the trial court held that the payment was timely; that the usual course of dealings between the parties established the use of the mails for payment, and drew such inference from the facts that the lawyers were in different cities, the statement of costs had been mailed, and all other service and negotiations by the parties in connection with this lawsuit had been submitted by mail. Under the circumstances, we find no error of law and the finding of the trial court cannot be set aside as clearly erroneous, F.R.C.P. Rule 52; *Friedman v. Sealy, Inc.*, 10 Cir., 274 F. 2d 255; *Colby v Cities Service Oil Company*, 10 Cir., 254 F. 2d 665. Nor does the order requiring re-deposit constitute a prohibited reversal by one district judge of the order of another. The act of signing the check allowing withdrawal of the monies was not a formalized order and was not premised upon a determination of either law or fact. The order appealed from held only that a self-executing order of the court had been abused by plaintiff and such determination was made by the judge to whom the matter was regularly assigned. And, in fact, the motion was heard only after full understanding by both judges of the procedural complications involved.

The judgment is affirmed.

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GEORGE A. LEE, *Petitioner*,

vs.

WESTERN WOOL PROCESSORS, INC., *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No formal prior order being involved here, a judge of the District Court does not commit error nor abuse his discretion in ordering monies removed from Registry to be replaced, and there is no conflict among the Circuit Courts.	6
No error of law was committed in requiring Petitioner to redeposit monies into Registry.	8
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1032

GEORGE A. LEE, *Petitioner*,

v.

WESTERN WOOL PRODUCERS, INC., *Respondent*.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondent prays that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit applied for herein by the petitioner be denied.

Opinion Below

The opinion of the United States Court of Appeals in this case appears in 313 F. 2d 13 (10th Cir. 1962).

Statement of the Case

The petitioner is asking the Court for a Writ of Certiorari to review an order of Judge William E. Doyle of the United States District Court for the District of Colorado which requires the petitioner to redeposit certain funds to the registry of the court. This order was entered on March 5, 1962. The order was appealed to the United States Court of Appeals Tenth Circuit, where it was affirmed. *Lee v. Western Wool Processors, Inc.*, 313 F. 2nd 13 (10th Cir. 1962).

The sequence of events leading to the subject order are as follows:

The petitioner, George A. Lee, plaintiff below, recovered judgment against the respondent, Western Wool Processors, Inc., the defendant below, on February 21, 1961 (R. 3). The judgment was based upon a note payable by the respondent and was obtained without the necessity of a hearing by stipulation of the parties (R. 2). The order granting judgment was signed by Judge Hatfield Chilson.

Execution on the judgment was to be stayed until the court could hear the merits of respondent's counterclaims (R. 3). On July 13, 1961 Judge Orie L. Phillips vacated the stay of execution (R. 3).

Petitioner then began to initiate execution proceedings against the respondent's plant facilities. On November 6, 1961, the respondent's counterclaims still not being heard, respondent petitioned the court for an early pretrial date (R. 4) and offered to place the total amount of petitioner's judgment plus interest and attorney's fees into the registry fund of the court until the hearing on the counterclaims was completed. This was stipulated to by the parties and an order accomplishing this was signed by Judge Hatfield Chilson on November 22, 1961 (R. 5, 6). This order included a provision that respondent must reimburse petitioner's counsel the amount of certain expended costs and expenses within ten days from the receipt of a state-

ment as to their amount (R. 5). If payment was not made within the period provided plaintiff could withdraw the amounts deposited in the registry fund without further order of the court (R. 5). Pursuant to this order, respondent deposited with the court the sum of $17,237.44.

Counsel for respondent received the statement of expended costs of $50.19 on December 22, 1961 (R. 7, 9). The requested amount was posted to petitioner's attorneys on January 2, 1962, the legal tenth day (R. 9, 19) and received by petitioner's attorneys on January 3, 1962, the day following (R. 10, 19). On the day of receipt and after actual receipt, one of the counsel for respondent talked by phone with one of the attorneys for the petitioner and advised him that the check had been sent. The attorney for petitioner intentionally withheld any disclosure that his office was in the process of attempting to withdraw the funds from the registry of the court (R. 9), he did not return the check sent in payment and subsequently cashed the same through his regular office account.

On January 3, 1962, both law offices representing the parties were aware of the fact that Judge William E. Doyle was assigned this case. On the morning of January 3, 1962, according to Judge Doyle's opinion (R. 19), counsel for the petitioner made an oral application requesting release of the deposit to petitioner on the theory that payment of the expended costs had not been received in conformance with the existing order. Judge Doyle asked counsel to prepare an order and he would consider petitioner's request (R. 19). Counsel for petitioner returned to his office to prepare an order, but in the afternoon, already having received payment of the costs, he returned not to Judge Doyle, but to Judge Hatfield Chilson and waited there until five o'clock and obtained Judge Chilson's signature on the clerk's check for the amount in the registry fund. This was handled as a summary matter without a hearing (R. 19). The order requested by Judge Doyle was not signed.

Counsel for the respondent did not discover the with-

drawal of the funds until February 20, 1962, when they paid an interest payment in conformance with the Court's order (R. 10). Upon this discovery a Motion For Order Requiring Re-Deposit of Monies Withdrawn From the Office of The Clerk of The Court was promptly filed (R. 9, 10). Judge Doyle ordered the return of the funds by his order dated March 5, 1962 (R. 19, 20, 21).

The United States Court of Appeals, Tenth Circuit, affirmed Judge Doyle's order in *Lee v. Western Wool Processors, Inc.*, 313 F. 2nd 13 (10th Cir. 1962).

Petitioner is requesting review of Judge Doyle's order as affirmed.

Argument

In argument the respondent shall restrict himself to the questions set forth by the petitioner and an assertion that this case is not of such public importance as to warrant review by this Court.

I

No departure from the usual course of judicial administration has occurred.

The first question presented by the petitioner is:

> In affirming the judgment of a judge of the District Court overruling and reversing a prior Order of a Judge of the same court, has the Court of Appeals so far sanctioned departure from the usual course of judicial administration as to require correction by this Court?

A careful examination of the record reveals that a second judge of the District Court at no time overruled or reversed an Order of a first judge in the sense discussed in the cases cited by the petitioner.

When petitioner withdrew the funds from the registry fund of the court the outstanding order under which both parties were operating was that order which created the deposit signed by Judge Hatfield Chilson on November 22, 1961. The fact that Judge Chilson signed this order was a fortuitous event inasmuch as the order was stipulated to by the parties. It was signed as a matter of course and could have been entered by any judge of the court.

Judge Doyle was assigned this case sometime after the signing of the November 22, 1961 order.

When petitioner desired to withdraw the funds, his counsel approached Judge Doyle with his request which was made orally (R. 19). Judge Doyle informed petitioner's counsel that he would permit the withdrawal of funds only upon his consideration of an order which he requested be prepared and presented to him. He in effect modified the November 22, 1961 order in that regard. It is unchallenged that this was within Judge Doyle's proper discretion. It is an accepted practice that a judge, following his appointment to a case may review prior orders in the case and amend them or overturn them if he deems it necessary. *Rachel Castner v. First National Bank of Anchorage, Artic Cold Storage, Inc., and Union Bank of Anchorage*, 278 F. 2nd 376 (9th Cir. 1960). On the same day, petitioner, however, approached Judge Chilson who was not assigned this case and secured his signature on the check withdrawing the funds, apparently representing he was entitled to the same as a matter of course. No formal order was entered.

One and one half months later upon discovery of the removal of the funds, counsel for respondent filed a motion asking redeposit. Judge Doyle, as the judge assigned, heard the motion in due course. In ordering the funds returned to the registry of the court, Judge Doyle, after a full hearing of all of the facts, stated (R. 20):

"Normally, the ruling of one of the judges of this

> Court would not be reviewed or reconsidered by another judge, but this is not the situation presented. No formal order was entered as had been originally suggested . . . ."

Judge Doyle correctly ruled that a self-executing order of the Court had been abused by the petitioner and ordered the funds redeposited. It was clearly within his duty as the judge assigned to the case to see to it that orders of the court received full compliance by the parties.

In affirming Judge Doyle's order, Judge Lewis in *Lee v. Western Wool Processors, Inc., supra* at page 16 states:

> "Nor does the order requiring re-deposit constitute a prohibited reversal by one district judge of the order of another. The act of signing the check allowing withdrawal of the monies was not a formalized order and was not premised upon a determination of either law or fact. The order appealed from held only that a self-executing order of the court had been abused by plaintiff and such determination was made by the judge to whom the matter was regularly assigned. And, in fact, the motion was heard only after full understanding by both judges of the procedural complications involved."

The order given by Judge Doyle clearly is not so radical a departure from the usual course of judicial administration as to require correction by this Court.

II

No formal prior order being involved here, a judge of the District Court does not commit error nor abuse his discretion in ordering monies removed from Registry to be replaced, and there is no conflict among the Circuit Courts.

The second question presented by petitioner is:

> When one judge of the District Court reviewed and construed his own Order and ordered the payment of the amount of petitioner's judgment out of the Registry of the Court in conformity with such Order, is it error and an abuse of discretion for a judge of the same Court to overrule and reverse the action of his colleague judge when the facts and circumstances under which both judges were acting were identical and the first judge was available to reconsider his Order?

The question as posed by petitioner assumes that the signing of a check is the equivalent of the signing of a formal order. Such is not the case and was so determined by the court below *Lee v. Western Wool Processors, Inc., supra* at page 16.

Nevertheless to appropriately meet the question as posed it will be assumed ARGUENDO *that an order was actually involved here. The authorities as cited by petitioner actually support respondent's position.*

In *United States v. Wheeler*, 256 F. 2d 745 (3rd Cir. 1958) at pages 747, 748, an example of the cases cited by the petitioner as illustrative of the general rule that one judge of the District Court cannot and should not attempt to overrule or reverse the action of another judge of the same court, it is said:

> ". . . . But it is not always possible at the outset to determine whether the identical matter is simply being presented over again for reconsideration, or whether more accurately the matter is being reopened and additional matter presented bearing on the same question of law once decided on what was so far available. In that latter situation the question has not really been decided earlier and is posed for the first time. The second judge ought, therefore, be free to render a decision."

When Judge Chilson gave petitioner permission to draw the funds he was not aware that there was a question of law involved, and being an *ex parte* proceeding it was not brought to his attention. He was not fully aware of the prior proceeding before Judge Doyle nor was he aware of the facts surrounding respondent's belief that the submitted check had been accepted in compliance with the prior order.

Judge Doyle gave his order to redeposit the monies only after having considered all of the above facts. He stated in his opinion (R. 20):

> "The undersigned is firmly of the opinion that the ex parte release of these funds would not have been permitted had the facts been clearly understood by Judge Chilson at the time."

Thus, even assuming the signing of the check to be a formal order it would have been entirely proper for Judge Doyle to rule as he did under the cases cited by the petitioner to support the opposing view. Therefore, there is no conflict of the cases among the circuits and the Tenth Circuit has rendered a decision in full agreement with the other circuits in affirming Judge Doyle's order.

III

No error of law was committed in requiring petitioner to redeposit monies into Registry.

The third question presented by the petitioner follows:

> Did the Court of Appeals commit error in affirming the judgment of the District Court requiring payment of the amount of Petitioner's judgment into the Registry of the Court?

Under the order of November 22, 1961 there was a provision that petitioner's attorneys should be reimbursed for certain costs within ten days after the receipt of a statement by

respondent. The facts are not disputed. Petitioner mailed the statement of costs and respondent's counsel received the statement on December 22, 1961. Counsel for respondent mailed the check for the costs to petitioner's counsel on January 2, 1962, the legal tenth day.

It is universally held that where the usual course of dealing between the parties is by mail, payment may be made by mail, and in so using the mails, the post office becomes the agent of the creditor, and a mailing on the last day of a designated period is timely payment. *Colonial Life and Accident Insurance Company v. Sarah Ethel Wilson*, 246 F. 2d 922, *cert. den.* 355 U.S. 927, (5th Cir. 1957), *Fant v. Miller*, 218 S.W. 2d 901 (Tex Civ. App. 1949), *Norskog v. Atha*, 61 Ohio L. Abs. 604, 102 N.E. 2d 907 (1951), and the recent case of *United Securities Corporation v. Franklin*, 180 A. 2d 505 (D.C. Municip. Ct. of App. 1962). No series of payments is required, a usual course of dealing between the parties or other facts from which such direction or assent may be inferred is sufficient *Fant v. Miller, supra, United Securities Corporation v. Franklin, supra*, also see 40 *Am. Jur.*, Payment § 36, at page 737.

Judge Lewis in the Court of Appeals opinion, *Lee v. Western Wool Processors, Inc., supra* at page 16, stated:

> "In interpreting its own order the trial court held that the payment was timely; that the usual course of dealings between the parties established the use of the mails for payment, and drew inference from the facts that the lawyers were in different cities, the statement of costs had been mailed, and all other service and negotiations by the parties in connection with this law suit had been submitted by mail. Under these circumstances, we find no error of law and the finding of the trial court cannot be set aside as clearly erroneous . . ."

Petitioner cited the above passage in the Petition for Writ of Certiorari as a "resort to fiction and analogies to the law of payment" obviously feeling that the law of payment does not apply. Yet petitioner did not cite one case which would indicate that the law of payment was not applicable nor did petitioner give an argument or cite any cases which would show that this fact situation should stand by itself and have different rules applied to it.

The Court of Appeals decision was correct on the merits in its affirmance of Judge Doyle's order.

IV

No matter of public importance is involved in this matter which should occupy the attention of this Court.

Lastly, respondent submits to this Court that this order is not of such public importance as to warrant review. The fact situation concerns an order entered during the course of litigation requiring petitioner to replace certain funds withdrawn from the registry account. Petitioner suggests that the basically simple facts are vastly complicated under the questions argued above. It is submitted that determination of these questions, while of extreme importance to the parties involved, can hardly add significantly to the law. A decision determining the applicability of the law of payment where counsel's mailed check is received on the date application is made for withdrawal can hardly be expected to have wide applicability thereafter. Neither can a decision determining one District Judge's jurisdiction to hear and determine a motion for redeposit of funds into registry after an alleged improper removel be expected to have wide application. Finally it should be noted that there is no statutory or constitutional provision here which should occupy this Court's attention.

In *Layne & Bowler Corporation v. Western Well Works,*

Inc., et al. 261 U.S. 387 (1923) at page 393 Mr. Chief Justice Taft for a unanimous Court stated:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

This language is particularly appropriate here.

Conclusion

The ruling of the Court of Appeals is clearly in the usual course of judicial administration and does not conflict with decisions in other circuits. Further, this case is not of sufficient public importance to warrant review by this Court.

Respectfully submitted,

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